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No. 82-1528

In the Supreme Court of the United States

OCTOBER TERM, 1982

STANTON A. TISDALE, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*, an award of compensation for permanent total disability precludes an additional "schedule" award for permanent partial disability under 33 U.S.C. 908(c)(1)-(20).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is not reported. The opinion of the Benefits Review Board (Pet. App. A31-A62) is reported at 13 Ben. Rev. Bd. Serv. (MB) 167. The opinion of the administrative law judge (Pet. App. A19-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1982. The petition for a writ of certiorari was filed on March 10, 1983. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. From March 20, 1974, to March 11, 1977, petitioner worked under noisy conditions in respondent Lockheed Shipbuilding & Construction Company's plate shop (Pet.

App. A22, A38). On March 29, 1977, petitioner began working aboard ship under somewhat less noisy conditions for respondent Owens-Corning Fiberglas Company (*ibid.*). Petitioner continued working for Owens-Corning until April 14, 1977, when he fell from a scaffold and sustained multiple injuries, including a perforated left eardrum (*id.* at A38). Since the time of his fall, petitioner has been totally disabled and has not returned to work (*ibid.*).

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("the LHWCA"), 33 U.S.C. (& Supp. V) 901 *et seq.*, Owens-Corning paid petitioner temporary total disability benefits from April 14, 1977, to February 10, 1978 (see 33 U.S.C. 908(b)), and it has paid him permanent total disability benefits ever since (see 33 U.S.C. 908(a)) (Pet. App. A38).[1] In May 1977, petitioner was diagnosed as having a binaural hearing loss due to continued exposure to noise (Pet. App. A39). He thereupon filed a claim for permanent *partial* disability benefits under 33 U.S.C. 908(c)(13) for occupational hearing loss, in addition to the *total* disability benefits he was already receiving for his injuries from the fall (Pet. App. A39).[2]

2. The administrative law judge rejected petitioner's claim. Based on petitioner's statement to his physician that he had experienced no hearing difficulty before the scaffold accident and an examining audiologist's comments that the administrative law judge found "clearly suggestive of manipulative behavior" by petitioner, the ALJ found that

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[1]Under 33 U.S.C. 908, the weekly disability benefits due petitioner are 66-2/3% of his average weekly wages, as determined under 33 U.S.C. 910.

[2]Section 8(c) of the LHWCA, 33 U.S.C. 908(c), sets forth, *inter alia*, a schedule of injuries for which permanent partial disability benefits will be paid and the amount of compensation to be awarded for each such injury. Loss of hearing of both ears entitles an employee to receive 200 weeks of compensation. 33 U.S.C. 908(c)(13).

petitioner "was first made aware of the nature of his condition and its relationship to his exposure to noise at work by his physician in May 1977" (Pet. App. A25-A26). The administrative law judge therefore concluded that the injury had occurred for compensation purposes when it became manifest to petitioner through medical advice, *i.e.*, in May 1977, and he held that petitioner's receipt of total disability benefits for his accident precluded an additional award under the schedule for his partial hearing disability (*id.* at A26).

The Benefits Review Board affirmed that portion of the administrative law judge's order (Pet. App. A31-A51). The Board found substantial evidence to support the ALJ's finding that petitioner had been exposed to harmful noise while employed at Owens-Corning (*id.* at A40). The Board also found that, under any of three alternatives for determining the date of injury from an occupational disease—the date of manifestation, the date of last exposure to injurious stimuli, or the date of disability—there was substantial evidence to support the ALJ's finding that the hearing loss had not occurred before petitioner's fall from the scaffold (*id.* at A40-A43). The Board held that petitioner was not entitled to any additional benefits for his partial disability "because a schedule award cannot coincide with a total disability award, where the total disability is in part due to an injury under the schedule" (*id.* at A44). Member Miller dissented, arguing that the total disability award was irrelevant to the schedule award (*id.* at A52-A62).

3. The court of appeals affirmed in an unpublished memorandum (Pet. App. A1-A11). The court agreed with the Board that, regardless of which test is used to fix the date of petitioner's hearing loss, substantial evidence supports the finding that the hearing loss did not occur before the totally disabling injury (*id.* at A4-A6). Accordingly, the court held that "[petitioner] is not entitled to an independent schedule award on the basis of a prior disabling injury"

(*id.* at A6). The court next rejected petitioner's argument that he is, in any event, entitled to both partial and total disability benefits for the injuries he sustained in the fall. Since the payments for petitioner's totally disabling injuries suffered as a result of his accident, including his hearing loss, compensated him for his lost earning capacity, the court stated, additional payments under the schedule "would amount to double recovery" and should not be allowed (*id.* at A9). Judge Hug dissented, contending that petitioner was entitled to a schedule award for hearing loss that occurred before his accident (*id.* at A12-A18).

ARGUMENT

The unpublished decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Moreover, the court's decision is correct and consistent with the purposes of the LHWCA. Accordingly, further review by this Court is unwarranted.

1. Petitioner challenges (Pet. 18-23) the finding that his hearing loss did not occur before his totally disabling injury. As the court of appeals held, however, that finding is supported by substantial evidence under any of the alternatives for determining the date of injury of an occupational disease for compensation purposes.[3] Petitioner's report to his physician that he had experienced no hearing difficulty before the date of the scaffold accident supports both the conclusion that his hearing loss became manifest in May 1977 when the doctor diagnosed it[4] and the conclusion that

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[3]Section 21(b)(3) of the LHWCA provides that "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3).

[4]This Court approved the use of a "manifestation test" for determining when an employee had contracted silicosis in a case arising under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, and the Boiler

petitioner was not disabled before the date of the fall (Pet. App. A5-A6). The testimony that a noise factor was present at Owens-Corning, unrebutted by evidence that the noise was not injurious, supports the finding that petitioner's last exposure to injurious stimuli was the date of his totally disabling accident (*id.* at A5). Because the court of appeals neither "misapprehended [n]or grossly misapplied" the substantial evidence test, there is no reason for this Court to review the date-of-injury finding. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

2. Petitioner also contends (Pet. 13-18) that, even if his hearing loss did not predate his other injuries, it was "incurred concurrent with * * * the total loss of earning capacity" (*id.* at 13), and therefore he is entitled to a schedule award in addition to compensation for total disability. This contention is without merit.

The decision below refusing to grant a schedule award over and above a permanent total disability award is fully in accord with the purposes of the LHWCA. The primary purpose of the LHWCA is to provide compensation for disability or death resulting from injuries to employees in certain maritime employment. The statute defines "disability" to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). As used in the LHWCA, therefore, "disability" is an economic concept, rather than a medical one. And, as such, it makes little

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Inspection Act, 45 U.S.C. 22 *et seq. Urie* v. *Thompson*, 337 U.S. 163, 170-171 (1949). The Court reasoned that " 'the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves.' " *Id.* at 170, quoting *Associated Indemnity Corp.* v. *Industrial Accident Commission*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932). Because hearing loss due to noise levels also accumulates over time, the use of a "manifestation test" was appropriate here as well.

sense to compensate an employee for more than total disability.[5] Petitioner is already receiving the level of compensation for his accident that Congress deemed appropriate to replace a full salary for an employee who is no longer able to work at all; an additional schedule award would be, as the court of appeals stated (Pet. App. A9), a "double recovery."[6]

Petitioner relies (Pet. 13-15) on *Potomac Electric Power Co.* v. *Director, OWCP ("Pepco")*, 449 U.S. 268 (1980), but that decision is inapposite. In *Pepco*, the Court held that the specific compensation provided in the schedule for partial disabilities was mandatory, and therefore the Court rejected the claimant's contention that he could elect between the schedule recovery or a recovery based on actual loss of wage-earning capacity under 33 U.S.C. 908(c)(21). The *Pepco* Court never suggested that a schedule recovery

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[5]Several provisions of the LHWCA operate to preclude the payment of more compensation than the 66-2/3% of average weekly wages that is paid for total disability. For example, Section 8(c)(22), 33 U.S.C. 908(c)(22), requires multiple schedule awards to be paid consecutively, hence preventing the compensation paid during the period of overlap from exceeding 66-2/3% of wages. See also 33 U.S.C. 909(b)-(d) (total compensation for death may not exceed 66-2/3% of deceased employee's average weekly wages, even though sum total of survivors' individual death benefits otherwise might exceed that figure).

[6]This is consistent with a construction of the New York Workmen's Compensation Law, upon which the LHWCA was based. See *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 275 (1980). In *Clark* v. *Hayes*, 207 A.D. 560, 202 N.Y.S. 453, aff'd, 238 N.Y. 553 (1924), a case decided before the LHWCA's enactment in 1927, the court held that payment of total disability benefits precluded a schedule award for an injury arising out of the same accident. The court noted that "[n]o other item of permanent partial disability, such as the loss of a hand, arm or leg, would be separately allowed concurrently with an award for permanent total disability. If so, the result would be an overlapping of awards and possibly a double award for the same elements." 207 A.D. at 563, 202 N.Y.S. at 455.

was mandatory in the sense that it should be paid in addition to compensation for permanent total disability. Indeed, to the extent *Pepco* is relevant at all, it supports the decision below. The Court specifically noted that "since the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." 449 U.S. at 278 n.17. Because the context of this statement concerns a schedule injury arising out of the same cause as the totally disabling injury, it is not completely dispositive of petitioner's contention, but, at a minimum, it precludes a schedule award for the portion of petitioner's hearing loss attributable to the scaffold accident. Certainly, the decision below does not conflict in any way with *Pepco*.[7]

Petitioner also relies (Pet. 15-16) on *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980), for its view that "concurrent awards for both permanent partial and permanent total disability are permissible." But *Hastings* did not involve concurrent *schedule* and permanent total disability awards; it presented the question whether permanent total disability compensation could be paid in addition to permanent partial disability benefits based on *actual impairment* due to an earlier injury, pursuant to 33 U.S.C. 908(c)(21). 628 F.2d at 90-91. As the court there explained, *Hastings* involved no

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[7]Petitioner points out (Pet. 14) that *Pepco* recognizes that an employee may receive a schedule award even if his earning capacity is not actually impaired. See 449 U.S. at 269. However, that is so because the schedule is designed to satisfy a key goal of the LHWCA by providing a "prompt and certain" recovery approximating earnings loss (see 449 U.S. at 282); like any approximation, there will be instances in which the schedule recovery differs greatly from the actual earnings loss. That is a defect that Congress felt was outweighed by the advantages of the schedule. But the fact that the schedule is occasionally unrepresentative of earnings loss does not suggest that the schedule should be available to provide the double recovery sought here.

double recovery because the income base for Hastings' total disability benefit reflected a diminution in his income caused by his prior partial disability. *Id.* at 91. Thus, *Hastings* is plainly distinguishable from this case because the total compensation paid to Hastings for his two disabilities did not exceed the amount he would have received had he been totally disabled by the first injury. Indeed, the court of appeals specifically noted that, had Hastings' aggregate disability payments "represent[ed] more earning capacity than he had to begin with," it would not have allowed such "double-dipping." *Id.* at 96 n.30. Accordingly, there is no conflict between the decision below and *Hastings*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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